

STATE OF MICHIGAN
COURT OF APPEALS

PATRICIA A. SPOOR Personal Representative of
the Estate of JAMES J. LEWIS,

Plaintiff-Appellant,

v

JEFFREY CHUHRAN, JOSEPH CICCHELLI,
JEREMY KASTL, KEVIN KASTL and DORIE R.
KASTL,

Defendants-Appellees,

and

ANNETTE JONES and MICHAEL R. JONES,

Defendants.

Before: Sawyer, P.J., and Kelly and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order dismissing her claims against defendants Jeffrey Chuhran, Joseph Cicchelli, Jeremy Kastl, Kevin Kastl, and Dorie Kastl. The trial court dismissed plaintiff's claims because she failed to post a security bond as ordered by the trial court. We affirm.

I. Facts

Plaintiff's claims arise from decedent James Lewis's death, which resulted from an incident in which vehicles driven or owned by defendants struck Lewis as he attempted to cross M-115 on foot in dusk or dark and rainy conditions. After drinking with his friends and not having a normal night's sleep, Lewis, who was dressed in dark clothing, crossed M-115 on foot to purchase more alcohol from a gas station. After making his purchase, Lewis attempted to re-cross M-115. According to Chuhran, as he was driving he saw that Lewis "turned and ran across the road." Although Churhan swerved and braked to avoid Lewis, the two collided. Chuhran immediately pulled over, turned on his emergency flashers, and called 9-1-1. However, before he connected with the 9-1-1 operator, another vehicle struck Lewis. After being struck by

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No. 258497
Wexford Circuit Court
LC No. 03-017429-NO

Chuhuran, Lewis was hit by vehicles driven by Jeremy Kastl, Cicchelli, and Annette Jones. At some point during these events, Lewis died.

II. Analysis

Plaintiff contends that the trial court erred in dismissing her claims on the basis of her failure to post a security bond as ordered. Plaintiff argues that the trial court abused its discretion in ordering her to post the bond. We disagree.

“We review a trial court’s decision to require a security bond for an abuse of discretion.” *In re Surety Bond for Costs*, 226 Mich App 321, 331; 573 NW2d 300 (1997). “A trial court’s determinations regarding the legitimacy of the claims and a party’s financial ability to post a bond are findings of fact that are reviewed only for clear error.” *Id.* at 333.

Pursuant to MCR 2.109(A),

On a motion of a party against whom a claim has been asserted in a civil action, if it appears reasonable and proper, the court may order the opposing party to file with the court clerk a bond with surety as required by the court in an amount sufficient to cover all costs and other recoverable expenses that may be awarded by the trial court

A court may require a security bond when there is a substantial reason for such a requirement. *In re Surety Bond for Costs*, *supra* at 331. “A ‘substantial reason’ for requiring security may exist where there is a ‘tenuous legal theory of liability,’ or where there is good reason to believe that a party’s allegations are ‘groundless and unwarranted.’ ” *Id.* at 331-332, quoting *Hall v Harmony Hills Recreation, Inc.*, 186 Mich App 265, 270; 463 NW2d 254 (1990). An order to post security costs may be appropriate “ ‘where there is good reason to believe that a party’s allegations, although they cannot be summarily dismissed under MCR 2.116, are nonetheless groundless and unwarranted.’ ” *Farleigh v Amalgamated Transit Union, Local 1251*, 199 Mich App 631, 634; 502 NW2d 371 (1993), quoting *Wells v Fruehauf Corp.*, 170 Mich App 326, 335; 428 NW2d 1 (1988).

The trial court did not abuse its discretion in determining that there was a substantial reason for requiring plaintiff to post a security bond. In rendering its ruling, the trial court noted that it was careful not to make credibility decisions. It also noted that plaintiff pleaded a “viable claim.” Nonetheless, the trial court reviewed the evidence and determined that there was a “very thin basis here for finding the defendants are liable.” In so doing, the trial court considered the non-unanimous case evaluation award of no cause of action.¹ The trial court also considered the facts giving rise to plaintiff’s claims including Lewis’s high blood alcohol content, that Lewis walked or ran across the road while it was dusk or dark, and that there was no evidence of defendants driving above the posted speed limit.

¹ In *Farleigh*, *supra* at 635-636, the trial court also considered the case evaluation decision.

In regard to plaintiff's claims against Chuhran, the legal theory was tenuous and the claims were groundless. Plaintiff's theory was that Churhan should have seen Lewis crossing the road in time to avoid hitting him. However, plaintiff presented no evidence indicating that Churhan could have avoided hitting Lewis who walked or ran out in front of Churhan's vehicle. There was also no evidence (other than witness testimony that the cars seemed to be going fast) that Chuhran was in violation of any traffic laws or the speed limit before or when the collision occurred. Although there was disagreement between Roger McWain's testimony that Lewis walked onto the road and Trooper Jeffrey Huovinen's testimony that Lewis ran onto the road, plaintiff's own expert testified that if Lewis ran onto the road, the collision could not have been prevented, but if Lewis walked onto the road it would have been more difficult for Chuhran to see him. Therefore, the distinction between Lewis walking or running onto the road is inconsequential. On the basis of the evidence, the trial court did not abuse its discretion in requiring plaintiff to post a security bond in regard to plaintiff's claims against Chuhran.

In regard to plaintiff's claims against the other defendants, Cicchelli and the Kastls, plaintiff's theory was similarly tenuous. Plaintiff alleged that Cicchelli and the Kastls should have seen Chuhran's emergency flashers, approached the area slowly and cautiously, and avoided hitting Lewis who was already lying on the road. However, there is nothing in the record suggesting that these defendants were required by law to slow down simply because Churhan had pulled over with his lights flashing. Nor is there any evidence suggesting that, even if they had slowed down, they could have identified Lewis, dressed in dark clothes, lying on the road in the dusk or dark conditions or avoided hitting him. Further, as with Chuhran, there was no evidence that these defendants were in violation of any traffic laws or the speed limit. Because there was a substantial reason for requiring the security bond, the trial court did not abuse its discretion in ordering plaintiff to post the bond.

Nor did the trial court abuse its discretion in refusing to waive the security requirement pursuant to MCR 2.109(B).

“ ‘If the trial court believes that a Rule 109 bond would be proper absent plaintiff's poverty, he must then assess the indigent plaintiff's financial ability to post bond. In this regard, the rule attempts to balance the right of a poor plaintiff to seek justice with the need of a defendant to have an opportunity for security. In our view, the rule establishes a strong preference for waiver of the bond where the indigent plaintiff's pleadings show a “meritorious claim”—i.e., a legitimate cause of action. In cases where the indigent plaintiff's pleadings show a tenuous legal theory, the plaintiff's interest in free access to the courts becomes less significant when weighed against the defendant's greater need for security. In short, the fulcrum of the rule's balance is the legitimacy of the indigent plaintiff's theory of liability.

“ ‘This is not to say that legitimacy of the claim will always be determinative. The rule clearly allows for sound trial court discretion. We can imagine few cases, however, where a discreet trial court will require an indigent plaintiff, pleading a valid theory of liability, to post security.’ ” [*In re Surety Bond for Costs*, *supra* at 332-333, quoting *Hall*, *supra* at 271-272, quoting *Gaffier v St Johns Hosp*, 68 Mich App 474, 478; 243 NW2d 20 (1976).]

Plaintiff asserts that she is indigent. This is not contested. The remaining question is whether plaintiff's pleading "states a legitimate claim." MCR 2.109(B)(1). Courts may consider the plaintiff's "likelihood of success" on a legal theory in determining the legitimacy of a claim. *In re Surety Bond for Costs*, *supra* at 333. Accordingly, in assessing the legitimacy of claims, this court has looked to the "demonstrated weakness" of a case, *Farleigh*, *supra* at 636, and a plaintiff's failure to offer evidence in support of his allegations, *In re Surety Bond for Costs*, *supra* at 333.

Considering the demonstrated weakness of plaintiff's claims and her failure to offer evidence in support of her claims, the trial court did not clearly err in determining that plaintiff failed to state a legitimate claim. Further, the trial court properly exercised its discretion by balancing plaintiff's right to bring her tenuous claims with defendants' right to security, and determined that requiring plaintiff to post a bond of \$5,000 was appropriate. The trial court did not abuse its discretion by refusing to waive the requirement of security. Accordingly, when plaintiff failed to come forward with that security, the trial court properly dismissed plaintiff's claims. *In re Surety Bond for Costs*, *supra* at 332.

Affirmed.

/s/ David H. Sawyer
/s/ Kirsten Frank Kelly